United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-7017

United States Court of Appeals

For the Second Circuit.

AACON AUTO TRANSPORT, INC.,
Plaintiff-Appellant,

vs.

JOHN BRUIN, d/b/a INTERSTATE AUTO DELIVERY
and INTERSTATE AUTO DELIVERY, INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Appellant's Brief

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STATUTES AND OTHER AUTHORITIES

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Was a clear case made by appellant AAACON for a preliminary injunction, the granting of which was denied by the District Court?

2. Was there a clear abuse of discretion by the District Court in transferring the case to a California federal District Court on the ground of forum non conveniens?

STATEMENT OF THE CASE

This is an action by plaintiff-appellant AAACON for breach of contract, fraud and for a permanent injunction against defendant-appellee BRUIN for breach of an agency agreement. Appellant AAACON moved for a preliminary injunction. Appellee BRUIN cross-moved to transfer the case to California on the ground of forum non conveniens. The District Court denied appellant's motion for a temporary injunction and, in addition, ordered the requested change of venue.

Appellant is a common carrier engaged in interstate commerce. It transports automobiles, in secondary movements in driveaway service, pursuant to Certificate of Authority MC-125808 issued by the Interstate Commerce Commission, between points in the United States.

On December 26, 1973, appellant and appellee entered into an agency agreement in New York City whereby appellant appointed appellee as its agent in the aforementioned driveaway business in the cities of Los Angeles and San Francisco in the state of California.

Alleging that appellee had knowingly and willfully made representations which he knew to be false (see paragraphs designated sixth, seventh and eighth of appellant's complaint)

in order to induce appellant to enter into the aforementioned agency agreement, upon which representations appellant AAACON relied, appellant commenced action against appellee in the month of September, 1974.

In said action for breach of contract, fraud and for a permanent injunction, appellant seeks actual damages in the amount of $435,000 as well as punitive damages in the amount of $2,000,000. Appellant also seeks an accounting for all sums due and owing it by appellee out of or relating to the agency agreement as well as an order permanently enjoining appellee from transporting vehicles in driveaway service in interstate commerce in violation of the agency agreement between the parties.

Appellant then obtained an order to show cause for a preliminary injunction signed by Honorable Dudley B. Bonsal a judge of the Southern District of New York. Appellee cross-moved to transfer the case to a California federal District Court.

After oral argument on November 11, 1974, Honorable Dudley B. Bonsal ruled from the bench denying appellant's application for a preliminary injunction and granting the cross-motion for change of venue. By order dated November 25, 1974, the District Court embodied the foregoing in a formal order.

It is from that ruling and order that appellant AAACON appeals.

ARGUMENT

I. THE DISTRICT COURT CLEARLY ABUSED ITS DISCRETION IN TRANSFERRING THE CASE TO CALIFORNIA ON THE GROUNDS OF FORUM NON CONVENIENS

We respectfully submit that the affidavits of Ralph J. Zola and Harvey Blackman, sworn to October 16, 1974 and October 22, 1974, respectively, clearly establish that the District Court abused its discretion in granting the cross-motion for change of venue.

In said affidavits, both sworn to by individuals with extensive personal knowledge of the facts, one a Vice-President of appellant and the other appellant's National Operations Manager, it is incontrovertibly established that six vital witnesses will testify at the trial of this action -- but only if the trial is held in New York City.

The identities of these six individuals are disclosed, their residences are disclosed and the extent and relevancy of their testimony are disclosed in specific and great detail. These witnesses for appellant AAACON include:

1. Mr. Ralph J. Zola, a Vice President of Aaacon. (A resident of New Jersey).

2. Mr. Harvey Blackman, Aaacon's National Operations Manager. (A resident of New York City).

3. Mr. Max Bardack, Aaacon's Controller. (A resident of New York City).

4. Mr. Allan Herman, President of Nationwide Auto Transporters Inc. (A resident of New Jersey).

5. Mr. Alfred Rappeport, a Transportation agent of Aaacon. (A resident of New York City).

6. Mr. Barney Daly, a Transportation agent of Aaacon. (A resident of Chester, Pennsylvania, approximately ninety miles from New York City).

We respectfully emphasize that these affidavits set forth many acts of fraud committed by appellee:

a. Prior to the signing of the agreement between appellant and appellee (i.e., the fraudulent representations made by appellee referred to supra).

b. Specific acts of fraud committed during the existence of the agreement between the parties.

c. Specific acts of fraud committed by appellee subsequent to the termination of the agreement between the parties.

In sharp contrast thereto, the record is barren of any evidence, sworn or unsworn, to the effect that anyone except appellee BRUIN will testify on his behalf. A careful search of the record does not reveal any submitted evidence whatsoever, sworn or unsworn, that appellee BRUIN would be required to transport witnesses, other than himself, from California to New York for a trial.

No affidavit as to additional witnesses was submitted to the District Court by appellee BRUIN -- sworn to by himself or by anyone else.

The only indication of witnesses in addition to BRUIN coming to New York from California was tangentially made in an unsworn memorandum of law submitted in the name of appellee's counsel, and then again in oral argument by said counsel in the District Court at the hearing of the motion. It is safe to assume that appellee's counsel made these unsworn statements with no personal knowledge of facts since he made no reference to having such personal knowledge.

Even in such unsworn statements by appellee's counsel, there are merely references to "numerous witnesses." No identification whatsoever of these alleged witnesses was offered in any form nor was there any statement as to either the relevancy or the importance of their "testimony."

It should be additionally noted that, in the appellant's affidavits referred to supra, it was asserted that the only witness for appellant BRUIN would be BRUIN himself. This contention by appellant was never denied or contradicted in any documentation submitted by appellant to the District Court, except, as indicated above in the unsworn statements of appellant's counsel.

We respectfully submit that the undisputed probative

evidence in the record reveals that appellant would have a minimum of six major witnesses to establish the fraudulent conduct of appellee in a New York trial and that the only witness on behalf of appellee would be BRUIN himself.

We submit that, in the face of the foregoing, it was a serious and vital abuse of discretion by the District Court to grant the application for a change of venue on the ground of "forum non conveniens."

We further respectfully submit that it would be highly inequitable to compel six witnesses to travel 3000 miles to California for a trial.

In the landmark case of Gulf Oil Corp. v. Gilbert, 330 U.S. 501, at p. 511, the United States Supreme Court, in deciding an issue of change of venue, stated, inter alia:

> "But he, the trial judge, was justified in concluding that this trial is likely to be long and to involve calling many witnesses, and that Lynchburg, some 400 miles from New York, is the source of all proofs for either side, with possible exception of experts. Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants." (Emphasis added.)

In Gulf, the Court also stated at p. 508:

> "It is often said that the plaintiff may not, by choice of an inconvenient forum "vex", "harass", or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." (Emphasis added.)

In the instant case, the balance is clearly and strongly in favor of plaintiff-appellant AAACON.

In addition, as cannot be disputed because it is clearly set forth in the agreement between the parties, the law of the State of New York must be applied in determining the issues in the instant controversy.

Consequently, we respectfully submit that a court, either Federal or State, located in the State of New York should hear the instant matter, rather than send it to California. As the Court stated in Gulf, at p. 509:

> "There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."

Appellant is proceeding against appellee under a simple agency contract and not for violations under 49 U.S.C. 322 (b) (2), as incorrectly alleged by BRUIN in the District Court.[1]

II. AN ADDITIONAL ERROR BY DISTRICT COURT IN GRANTING APPLICATION FOR CHANGE OF VENUE IS THE FACT THAT CONTACTS PERTAINING TO THE CAUSES OF ACTION IN APPELLANT'S COMPLAINT ARE ALMOST COMPLETELY WITH NEW YORK

In addition to the ready availability of the witnesses to a trial in New York City, as well as the convenience for them as contrasted with a trial in California, we respectfully note that the contacts pertaining to the causes of action in

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[1] Upon information and belief, the Interstate Commerce Commission is conducting its own investigation into possible violations by appellee BRUIN of the Interstate Commerce Act. Appellant AAACON has not sought enforcement of any provision of the Interstate Commerce Act nor does it seek either a preliminary or permanent injunction with respect thereto. In fact, appellant has not alleged in its complaint, or elsewhere, jurisdiction based upon that section of the Interstate Commerce Act. Appellant's only reference in the District Court to violations of the Interstate Commerce Act in its motion for preliminary injunction relates to said violations while appellee was an agent of appellant. We emphasize that appellant's sole intent in making said references was to foreclose the possibility of AAACON being accused of violations of the Interstate Commerce Act through the acts of its agent, appellee JOHN BRUIN. Were AAACON proceeding under Section 322, as incorrectly asserted by appellee in the lower Court, AAACON would have served the Interstate Commerce Commission to afford it the opportunity to intervene, which step appellant did not take. Furthermore, inasmuch as the Agency Agreement between appellant and appellee was terminated in September, 1974, any reference to violations of the Interstate Commerce Act by appellee, or any relief allegedly based thereon is no longer necessary or relevant.

appellant's complaint herein are almost completely with New York.

Appellant's affidavit submitted to the District Court, particularly the two affidavits of Ralph J. Zola and the affidavit of Harvey Blackman, set forth exhaustively the New York contacts pertaining to said causes of action in the complaint.

Said affidavits set forth that, on or about December 26, 1973, appellee came to New York and had lengthy meetings with AAACON officials at the New York City headquarters of AAACON located at 230 West 41st Street. These meetings in New York were held over a two-day period.

It should be noted that, at said meetings in New York City, appellee made false representations to appellant concerning his activities with another interstate motor carrier, Nationwide Auto Transporters, Inc., whose offices are located in Fort Lee, New Jersey and with whose officers appellee had just concluded meetings.

Relying upon misrepresentations made by BRUIN in person in New York, appellant entered into the agency agreement with him which:

a. was executed in New York City, and which

b. by its very terms specifically provided for the application of New York law to the interpretation of said agreement.[2]

It should be further noted that BRUIN'S weekly reports on shipments, (which AAACON will prove were fraudulent) as required by the agency agreement, were filed by him in New York City.

These reports, as stated, were mandated by the terms of the agreement and were, in fact, prepared under BRUIN'S personal direction and sent by him to AAACON in New York City.

Said reports fraudulently omitted a substantial percentage of the shipments made by BRUIN (1) for which AAACON was entitled to revenue, and (2) which AAACON was required to maintain as records at New York City and to make reports thereon both to the Interstate Commerce Commission and to AAACON'S insurance company.

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[2]We note parenthetically that appellee admitted in his papers submitted below that his application for change of venue was motivated in large part by consideration of the fact that the courts of California are by statute precluded from enforcing the relevant terms of the agreement between the parties. Appellant respectfully submits that the application of law provision contained in the agency agreement is clear and unmistakable, and that said application of New York law should not be defeated by the maneuverings of appellee herein.

The affidavits of Ralph J. Zola and Harvey Blackman set forth in detail and clarify AAACON'S charge of a fraudulent scheme by BRUIN to transport vehicles in interstate commerce in violation of his agreement with AAACON for the purpose of depriving AAACON of its revenue. This fraudulent scheme misrepresented to AAACON'S customers the extent of AAACON'S liability for damage to vehicles in the course of transport and failed to properly provide liability insurance coverage for the general public.

One of the main thrusts of appellant's case is that the reports filed by BRUIN with AAACON <u>in New York</u> omitted any reference to the fraudulent shipments referred to in said affidavits. Consequently, testimony of these unlawful shipments made in violation of the agreement between the parties can be proven only by witnesses in New York and, conversely, cannot be proven by any witnesses in California.

It is essential that, at the trial, plaintiff prove the fraud, to wit: the absence of proper reports, the absence of AAACON'S bills of lading and the deliberate failure to account to AAACON and pay it the revenue to which it was entitled. We respectfully submit that, since documents evidencing these fraudulent shipments are <u>only</u> located here in New York, no constructive purpose was served by transferring the matter to California for alleged convenience of witnesses <u>or</u> for ease of proof.

Mr. Zola's affidavit also makes reference to a specific fraudulent shipment made by appellee during the term of the agreement. Mr. Allan Herman, a resident of the State of New Jersey, who is president of Nationwide Auto Transporters, Inc., has stated to Mr. Zola, as set forth in the latter's affidavit, that he, Mr. Herman, will testify at a trial on AAACON'S behalf relating to said fraudulent contract by BRUIN. It is impossible for Mr. Herman to travel to California for a trial, and, if the change of venue prevails, AAACON will be deprived of a key witness.

III. THE DISTRICT COURT SHOULD HAVE ISSUED A PRELIMINARY INJUNCTION AGAINST APPELLEE BRUIN SINCE HIS SERVICES ARE UNIQUE AND INVOLVE SPECIAL CUSTOMER RELATIONS, MAKING HIM APPROPRIATELY SUBJECT TO A COVENANT NOT TO COMPETE

In view of the indisputable fact -- admitted by BRUIN -- that his services are unique and involve special customer relations, making him appropriately subject to a covenant not to compete, the District Court erred in denying appellant's application for a preliminary injunction.

We fully agree with the contents of paragraph "4" of BRUIN'S affidavit, sworn to September 26, 1974. In this paragraph, appellee BRUIN correctly defined "institutional" customers, as these terms are used in the automobile driveaway business.

Furthermore, in said paragraph, BRUIN correctly drew the distinction between institutional customers and casual customers. For the convenience of the Court, we cite said paragraph verbatim:

> "4. There are essentially two kinds of customers for driveaway service:
> a. Institutional customers such as banks and finance companies, and
> b. "Call in" or "casual" customers.
> The principal distinction is that institutional customers can be counted on for repeat business and the casual customer cannot." (Emphasis added).

The single sentence paragraph designated "6" in said affidavit of appellee reads as follows:

> "6. Prior to working for AAACON I had many business contacts with institutional customers in California."

The record clearly establishes, and it is undisputed, that, at the time of entering into the agency agreement with appellee BRUIN, appellant AAACON had very active branch offices in both Los Angeles and San Francisco in the State of California.

It is further undisputed that they had no such "business contacts with institutional customers in California." Their business was confined to "casual" customers.

Neither did appellee contradict that it was solely because of BRUIN'S "business contacts with institutional customers in California" that appellant AAACON entered into the

agency agreement with him.

According to the terms of the agency contract between the parties, it cannot be disputed that the law of New York must be applied to any interpretation of the terms of the agreement.

Unlike the law of California, the law of New York clearly protects an employer's right to reasonably restrain a former employee from soliciting active customers of his former employer. I. Edward Brown, Inc. v. Astor Supply Co., 4 AD 2d 177, 164 NYS 2d 107 (1st Dept. 1957). As the Court stated:

> "However, contracts designed to restrain for a limited time former employees from soliciting active customers of their former employer are enforcible (Interstate Tea Co. v. Alt, 271 N Y. 76, 2 N.E.2d 51; Peekskill Coal & Fuel Oil Co., Inc. v. Martin, 279 App.Div. 669 108 NYS 2d 30; Monroe Coverall Service, Inc. v. Bosner, 283 App.Div. 451, 128 NYS 2d 476). Hence, had Cohen voluntarily left plaintiff's employ or been discharged for cause, the injunction for one year prohibiting solicitation of former accounts would lie."

Additionally, whereas in the instant case, appellee BRUIN is not "just another employee" but, in fact, has developed an exclusive "institutional" following and demonstrated an ability to take these accounts with him to the exclusion of appellant AAACON, an injunction will properly lie. Cf. Meryl, Inc. v. Facherra, 51 Misc. 2d 864, 274 NYS 2d 188 (S.Ct. Bx. Co. 1966).

As the Court stated:

> "Under all the facts and circumstances, considering Facherra's demonstrated ability to attract customers, and the not unnatural desire of the plaintiff to eliminate him as a gifted and dramatic competitor in a narrow area, the covenant survives the test of reasonableness. It is what the parties bargained for, and is not at variance with the cases (cf. Lynch v. Bailey, 300 N.Y. 615, 90 N.E.2d 484, aff'd 275 App.Div. 527, 90 NYS 2d 359; Purchasing Assoc. v. Weitz, 13 NY 2d 267, 246 NYS 2d 600, 196 N.E. 2d 245; Wirth & Hamid Fair Booking v. Wirth, 265 NY 214, 192 N.E. 297; Hackenheimer v. Kurtzmann, 235 NY 57, 138 N.E. 735; Diamond Match Co. v. Roeber, 106 N.Y. 473, 13 N.E. 419; Goldstein v. Maisel, 271 App. Div. 971, 67 NYS 2d 410.
>
> Permanent injunction granted."

In Millet v. Slocum, 4 A.D. 2d 528 (4th Dept. 1957), 167 NYS 2d 136, the Appellate Division of the State of New York ruled, inter alia, at p. 139:

> "The fact that the performance of such a covenant invokes personal hardship upon the promisor does not in itself invalidate the promise."

And, at p. 140, the Court in Millet stated:

> "The circumstances in this case are quite analogous to the circumstances in Foster v. White, 248 App.Div. 451, 290 N.Y.S. 394, affirmed 273 N.Y. 596, 7 N.E.2d 710, and Keene v. Schneider, 202 Misc. 298, 114 N.Y.S.2d 126, affirmed 280 App.Div. 954, 116 N.Y.S.2d 494, and in our view the legal principles enunciated in those cases are likewise applicable here. The hardship

> imposed on the plaintiff is not when balanced with the needs of the defendants sufficient to invalidate the covenant. We conclude that the covenant is valid and that the judgment appealed from should be modified in that respect." (Emphasis added).

The affidavits submitted by appellant to the District Court made it abundantly clear that:

1. The termination of the agreement between the parties came about, not because of ordinary business differences between an employer and employee, or a principal or agent, but because of deliberate and willful fraudulent conduct engaged in by BRUIN to deprive AAACON of its customers as well as revenue.

2. The injunction sought herein is not calculated to deprive a man of his livelihood, that is, to deny him the right to work for a competitor. Involved herein are not merely general public customers, but almost exclusively a highly specialized field of institutional customers (a field in which BRUIN'S contacts are unique and irreplaceable.)[3]

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[3] As concrete proof of the fact that AAACON does not seek to deprive BRUIN of an opportunity to earn a livelihood, it agreed to stipulate that the injunction it seeks will apply merely to the institutional customers in the designated areas and not to so-called "casual" customers. This would leave BRUIN free to engage in competition with AAACON for "casual" customers in the entire State of California and even for institutional customers throughout the State except the areas restricted by the agreement.

In other words, the limitation of BRUIN'S competitive activities would be solely the geographical area in which he was to perform services for AAACON under the agreement and then only for institutional customers. All other areas in California would be available to him as indicated immediately above.

At the risk of repitition, we stress the distinction between "casual" and "institutional" customers:

a. A "casual" customer is a member of the general public -- an individual registered owner of a motor vehicle engaging a licensed motor carrier like AAACON to transport his automobile in interstate commerce.

b. An "institutional" customer refers to a bank or other institution which utilizes the same service for repossessed vehicles.

As to customers, American Law Reports, Annotated succinctly set forth the prevailing law as follows:

> "The most important single asset of most businesses is their stock of customers. Protection of this asset against appropriation by an employee is recognized as a legitimate interest of the employer. A restrictive covenant, therefore, complies with the first requirement on which its enforceability depends if it is designed to protect the employer against loss of his customers." 43 ALR 2d, p. 162.

IV. THE DISTRICT COURT FURTHER ERRED IN DENYING APPELLANT'S APPLICATION FOR A TEMPORARY INJUNCTION SINCE THE SUBMITTED EVIDENCE CLEARLY ESTABLISHED THAT APPELLANT WOULD SUFFER IRREPARABLE DAMAGE UNLESS SAID INJUNCTION WERE GRANTED

The affidavits of Mr. Ralph J. Zola and Mr. Harvey Blackman submitted to the District Court clearly spelled out a plot and a calculated scheme of fraud and misrepresentation by appellee BRUIN to inflict irreparable damage when it denied

appellant's application for a preliminary injunction.

It should be noted that these fraudulent and surreptitious acts by appellee occurred not only prior to the execution of the agency agreement between the parties, but also occurred during the term of the agreement as well as subsequent to the termination of the agreement.

We respectfully submit that the evidence submitted established that appellee is a calculating individual who has defrauded previous employers, and defrauded appellant prior to entering into a contract, during the contract and after the expiration of the contract.

Accordingly, it is logical to assume, we respectfully submit, that appellee will continue to inflict irreparable damage on appellant unless he is confronted with the full force and authority of an injunction issued by a Federal court.

We further respectfully submit that sufficient evidence was presented to the District Court to warrant a conclusion that appellant will prevail at a trial of the issues involved herein.

In view of BRUIN'S long standing pattern of unscrupulous and fraudulent conduct, and, in further view of the strong possibility of AAACON prevailing at the trial of this action, we submit that the preliminary injunction should have been granted. Most assuredly, BRUIN should not be permitted to reap any benefits stemming from his unconscionable conduct.

Appellant respectfully takes the liberty of reemphasizing in detail the irreparable damage it will suffer if appellee is not preliminarily enjoined.

It is not disputed that the agreement between the parties, by its express terms, required appellee to use literature carrying AAACON'S name, to use bills of lading carrying AAACON'S name and to build his list of institutional customers in AAACON'S name.

As the submitted papers clearly spell out, this was not done in a large percentage of cases. Had it been done in all cases, the name AAACON would become synonomous with "automobile transportation services" in the minds of the institutional customers as was within the contemplation of these parties when they entered into the agency agreement.

Instead, on many occasions, BRUIN used the name, "Interstate", and failed to use the proper papers, bills of lading and billing of AAACON.[4]

[4]We note parenthetically that in the course of these shipments which were not made on AAACON'S Bills of Lading for AAACON'S account, the insurance which AAACON held out to provide -- liability insurance in the amount of $3,000,000 -- was not available. To the extent that accidents could have or did occur involving third parties, the public was left unprotected by BRUIN'S actions.

Inasmuch as BRUIN did on many occasions use AAACON documentation, many of the institutional customers at this time associate AAACON'S name and activities with the transportation of automobiles. They have indicated to employees of AAACON that they would use AAACON were BRUIN not transporting vehicles independently of AAACON.

Unless BRUIN is restrained at this time, the name "AAACON" will slowly fade out of the minds of these institutional shippers. Accordingly, the business associations and connections which now accrue to AAACON'S benefit will be dissipated. The damage to AAACON'S business and its advertising good-will in this regard cannot be mathematically computed or demonstrated in a manner which would lend itself to the calculation of damages.

CONCLUSION

APPELLANT AAACON RESPECTFULLY URGES THAT THE DISTRICT COURT'S ORDER DENYING A PRELIMINARY INJUNCTION AND GRANTING A CHANGE OF VENUE BE REVERSED IN ALL RESPECTS.

Respectfully submitted,

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STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that dep[illegible]t is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 24 day of Feb, 1975 deponent served the within Brief upon Russell + Schurman

attonrye(s) for Appellee

in this action, at 1545 Wilshire Blvd.
Los Angeles, Ca 90017

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

.....
ROBERT BAILEY

Sworn to before me, this
24 day of Feb, 1975.

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976